STATE CAPITOL P.O. Box 110001 Juneau, AK 99811-0001 907-465-3500



550 West Seventh Avenue, Suite 1700 Anchorage, AK 99501 907-269-7450

Governor Michael J. Dunleavy STATE OF ALASKA

March 22, 2019

Mr. Andrew Wheeler Administrator Environmental Protection Agency Mail Code 1101A 1200 Pennsylvania Avenue, NW Washington, DC 20460

Dear Mr. Wheeler:

The State of Alaska (State) requests that the U.S. Environmental Protection Agency (EPA) correct the planning and attainment timelines applied to the Fairbanks North Star Borough (FNSB) nonattainment area for fine particulate matter (PM_{2.5}). Due to circumstances beyond the control of the State, specifically a 2013 court decision, the Fairbanks nonattainment area has ended up in an irrational and counterproductive process placing an extraordinary burden on residents and subverting Congressional intent reflected in the Clean Air Act (CAA).

As described in the attached memorandum from Attorney General Clarkson, when EPA designated Fairbanks as a nonattainment area in 2009, the agency directed the State to follow the Subpart 1 process when developing our State Implementation Plan (SIP) and moving to improve air quality. However, in 2013, the D.C. Circuit Court ruled that Subpart 4 applies to PM_{2.5} designations instead. As a result, new interim timelines for the development and implementation of a SIP were established. The State had to prepare a new SIP in 18 months. Although Subpart 4 generally gives states up to 4.5 years to implement the Moderate SIP after the plan is submitted, EPA gave the State only one year to implement the plan before the moderate attainment date for the Fairbanks nonattainment area. Similarly, EPA provided only one year to implement the Serious SIP following the due date for that plan, though Subpart 4 generally provides at least 2.5 years for a state to implement a Serious SIP after submitting it to EPA. In the aftermath of the 2013 court decision, EPA extended the statutory deadline to submit the Moderate SIP, but EPA

EPA's reclassification of FNSB to Serious was late, giving the state a total of about 2.5 years to implement the Moderate SIP – still less than the statute's 4.5 years and with the collateral impact of compressing the timelines for implementing a Serious SIP.

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did not extend the other Subpart 4 timelines. Effectively, the state lost three years of the total time Congress intended for states to have to plan and correct air quality problems.²

That loss of time resulted in a number of irrational consequences cascading in subsequent planning and implementation stages. For example, EPA did not approve the State's Moderate SIP until after reclassifying Fairbanks as a Serious nonattainment area. Also, the State has dedicated substantial resources to developing SIPs without having adequate time to implement the control measures in that plan before escalating to the next planning stage.³ We know that wood stoves are the primary source of PM_{2.5} in this area – perhaps unsurprising in a subarctic climate, but imposing Best Available Control Technologies (BACT) on the area utilities under the Serious SIP will increase energy costs and may drive more residents to burn more wood.⁴ Government is supposed to be about purpose, not process; but here, EPA's process is impeding the CAA's purpose of improving air quality.

Having adequate time to develop and implement the SIPs is particularly important in this case, because addressing air quality involves regulating residential use of wood stoves. It will be very difficult to make progress without community support. While the issue is highly controversial, the area has made considerable progress toward attainment in recent years. A rational process will go a long way to bolstering local buy-in.

For these reasons, the State of Alaska respectfully asks EPA to correct the timelines that allow the State to prepare and implement SIPs, which would result in a Serious SIP due date of June 30, 2021 and an initial serious attainment date of December 31, 2023.

As you consider this request, our Department of Environmental Conservation will continue to work on finalizing the Serious SIP with the aim of publicly releasing it for comment in May 2019. If EPA would like additional information on this matter, please contact Brett Huber at brett.huber@alaska.gov.

Sincerely,

Michael J. Dunleay

Governor

Enclosures: Memo from Alaska Attorney General Clarkson to Governor Dunleavy

Around the same time, the State also discovered that we had a much bigger problem to correct. The 2009 nonattainment designation was based on monitors reporting PM_{2.5} at 44 μ g/m³ in Fairbanks, but, in 2012, a new monitor set up 13 miles away in North Pole reported PM_{2.5} at 158.4 μ g/m³.

The State considered applying for a five-year extension, but there likely will not be adequate time to conduct the extensive analysis required by Region 10 before the applicable attainment date.

Fairbanks has some of the highest energy costs in the nation. Golden Valley Electric Association is a vertically integrated cooperative utility – regardless of whether the costs of BACT are put into utility rates, it will be utility ratepayers that ultimately bear the cost.

MEMORANDUM

State of Alaska

Department of Law

TO: Michael J. Dunleavy

DATE:

March 22, 2019

Governor

CC:

Brett Huber

Senior Policy Advisor

Office of the Governor

PHONE:

(907) 269-5100

FROM:

Kevin G. Clarkson

SUBJECT:

Correcting Timelines for

Attorney General

Fairbanks PM_{2.5} SIPs

EPA can adjust the deadlines applicable to the Fairbanks PM_{2.5} nonattainment area, including the deadlines for submitting State Implementation Plans (SIPs) and for bringing the area into "attainment." EPA established the existing deadlines based on statutory timelines measured from either the designation or the reclassification date. However, courts have approved adjustments of these types of Clean Air Act (CAA) deadlines as a remedy when circumstances beyond the control of the entity subject to the deadline compressed the timelines and undermined Congressional intent.

For example, in *NRDC v. EPA*, the court extended two deadlines as a remedial measure required by "equity and practicality." First, the court extended the explicit statutory deadline for states to submit enhanced I/M SIPs. The CAA required those SIPs to "comply in all respects" with guidance that EPA published a year late and only ten days before the SIP deadline. The court reasoned that Congress intended for states to have the benefit of the EPA guidance when preparing their SIPs. The court also extended a deadline for EPA to act on NO_x SIPs so the agency would have the full amount of time contemplated in the statute. The court noted that the compression of the statutory timeline was due to circumstances that Congress could not have anticipated and that were beyond EPA's control (i.e., the states needed time to develop credible photochemical grid modeling).

Here, states relied on EPA's statement in 2009 that the statutory process governing nonattainment SIPs generally (Subpart 1) applied to SIPs for PM_{2.5} nonattainment areas. Then, in 2013, the D.C. Circuit Court of Appeals held that, instead, a different statutory process governing PM₁₀ (Subpart 4) applied to PM_{2.5}. Among other differences, this

¹ 22 F.3d 1125 (D.C. Cir. 1994).

² NRDC v. EPA, 706 F.3d 428 (D.C. Cir. 2013).

established new interim timelines for SIP development and implementation. Effectively, states (including Alaska) lost more than three years of the planning and implementation timeline Congress set out in the CAA.³ Recognizing the impossible situation facing states, EPA extended the deadline to submit Moderate SIPs, which otherwise would have been well overdue under the statute.⁴ However, EPA chose not to extend the other Subpart 4 timelines.

Strictly interpreting the subsequent Subpart 4 deadlines has resulted in a muddled process that is inconsistent with Congressional intent. In Subpart 4, Congress set out an orderly, staged process for PM nonattainment areas. The statute provides time for states to develop and implement SIPs before EPA reclassifies an area. Reclassification results in a state obligation to prepare a new SIP and imposes more costly and burdensome control measures on the community—consequences that Congress intended to come only after initial efforts fail to bring the area into attainment.

For PM_{2.5}, EPA initially provided extremely truncated timelines for states to develop and implement Moderate SIPs. Currently, the State is developing a Serious SIP even though it will be impossible to get to attainment by the end of the year. The State will have to start working on a 5% plan almost immediately. The truncated timelines have effectively cut out the period for implementing the SIP before escalating the area to the next classification and more onerous control measures.

To correct the situation, EPA could reset the timelines. The table below outlines the amount of time Congress intended states to have to address nonattainment areas under Subpart 4, the current process EPA has established, and what the process could look like if EPA allowed the State to have the normal amount of time to prepare and implement the SIPs. Under this approach, Alaska's Serious SIP would be due June 30, 2021 and the initial serious attainment date would be December 31, 2023.

Making the situation more difficult for Fairbanks, several years after the nonattainment designation the state learned that the problem was much larger than previously understood. In 2009, EPA based its nonattainment designation on monitored PM_{2.5} levels in Fairbanks at 44 μ g/m³. In 2012, a new monitor later set up in North Pole, 13 miles away, reported PM_{2.5} at 158.4 μ g/m³. In addition, EPA made the standards for PM_{2.5} Moderate SIPs a moving target by measuring them against its "PM_{2.5} Implementation Rule," published in August 2016—after the Moderate SIPs had been submitted.

Wildearth Guardian, 2014 WL 943136 (D. Colo. 2014) (approving EPA's extension and noting the states were entitled to rely on the agency's earlier determination that PM_{2.5} was governed under Subpart 1).

1. Moderate SIP Development: States have 18 months to prepare a SIP after EPA designates a nonattainment area and calls for the SIP. 2. Moderate SIP Implementation: The moderate statainment date is the end of the 6 th calendar statainment date is the end of the Moderate SIP. 4.5 years to implement the Moderate SIP. 3. Serious Reclassification: After the moderate attainment date, EPA has 6 months to no reclassify an area to serious if it remains in the nonattainment. 4. Serious SIP Development: States have by the serious SIP Development: States have by the serious SIP Development of develop a Serious SIP. 18 months from EPA's serious SIP. 19 part of the SIP Development of Serious SIP.	EPA Timeline for Fairbanks December 31, 2014: EPA set the Moderate SIP due date in June 2014, leaving the State 6 months to prepare the document. December 31, 2015: EPA gave states 1 year to implement the Moderate SIP before the moderate attainment date. June 9, 2017: EPA reclassified Fairbanks as a serious nonattainment area 18 months after the moderate attainment date. December 31, 2018: Initially, EPA provides 6 months to develop Serious SIP, but later agreed to the normal 18 months.	June 30, 2019: States should have at least to implement the SIP. December 31, 2019: EPA has 6 months from the moderate attainment date to reclassify the area. June 30, 2021: The Serious SIP is due 18 months after reclassification as serious nonattainment area.
5. Serious SIP Implementation: States have 2.5 years to implement a Serious SIP and may apply for a 5-year extension for a total of the 7.5 years. 6. 5% Plan Development: States have remains in nonattainment after the serious tarainment date.	December 31, 2019: EPA allotted 1 year for the State to implement the Serious SIP. December 31, 2020: A 5% Plan will be required 12 months after the serious attainment date.	December 31, 2023 or 2028: States should have 2.5 years to implement the Serious SIP or 7.5 years if there is a successful application for a 5-year extension. December 31, 2024 or 2029: The 12 months to develop a 5% plan should be measured from the appropriate serious attainment date.